No. 15,926

IN THE

United States Court of Appeals

For the Ninth Circuit

ALFRED V. HAGEN,
Appellant,

vs.

CITY OF PALMER,
Appellee.

On Appeal from the District Court for the District of Alaska, Third Division.

BRIEF OF APPELLEE.

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JURISDICTIONAL STATEMENT.

The appellee concedes that the District Court for the Third Division, Territory of Alaska, has jurisdiction in this matter by virtue of the provisions of Sec. 16-1-70, Title 53, Chapter 2, and Title 69, Chapter 6, Alaska Compiled Laws Annotated, 1949, and 48 U.S.C. 101 and 193. The appellee also concedes that the United States Court of Appeals for the Ninth Circuit has jurisdiction on appeal as stated by appellant.

STATEMENT OF THE CASE CONTROVERTING THAT OF APPELLANT.

The appellant has omitted one salient fact from his Statement of the Case, namely, that a formal trial was held in this matter by the District Court, beginning at 10:00 o'clock A.M., October 23, 1958 (R., pp. 11, 12) (Sup. R., pp. 63-69); also on pages 2 and 3 of appellant's brief appears the following gross misstatement of fact:

> "In the District Court appellant filed his motion for judgment of acquittal and . . . submitted a stipulation of facts in support of said motion, for the purpose of raising the legal issue of the validity of the ordinance under which he was convicted in the magistrate's Court." (Appellant's Brief, pp. 2, 3.)

Appellee presents the following statement as being in better accord with the record:

The appellant, Alfred V. Hagen, was convicted in the Municipal Magistrate's Court of the City of Palmer, Alaska, on December 4, 1956, of the petty offense of failure to file his sales tax return for the month of August 1956, in violation of Section No. 6, Ordinance No. 40 of said City (R., pp. 3-7). It was his second conviction in the same Court of the same offense upon like facts (R., pp. 15, 49) (Sup. R., pp. 80, 81). He was represented by counsel (R., pp. 8, 9). He appealed to the District Court for the Territory of Alaska, Third Division at Anchorage, and the cause was set for trial at 10:00 o'clock A.M., Monday, October 21, 1957. On said date and at said time, when the case was called for trial, his counsel moved for con-

tinuance, which the Court granted, re-setting the case for trial at 10:00 o'clock A.M. of Wednesday, October 23, 1957 (R., pp. 10, 11).

The cause came on regularly for trial on said date, and upon the trial respective counsel stipulated to certain facts orally (R., p. 11) (Sup. R., pp. 63-69). Such stipulation of facts was made in order to facilitate the hearing of the case, save time for the Court and avoid the calling of witnesses and presentation of evidence (R., pp. 14, 15, 48, 49) (Sup. R. pp. 64-69).

Appellant's counsel informed the Court that the defendant (appellant herein) would not take the witness stand (Sup. R., pp. 66, 67). No witnesses were called by either party, counsel having orally stipulated to all the facts of the case, whereupon the Court directed counsel to prepare and submit written stipulation in accordance with said oral stipulation. There then remained only a question of law to be determined (R., p. 11). Whereupon, counsel for the defendant orally moved the Court for judgment of acquittal on the grounds that the sales tax ordinance under which the defendant is charged is void (R., p. 11) (Sup. R., pp. 65, 66). The Court reserved decision and proceeded to direct counsel, within specified time limits, to file briefs on the question of law raised by the defendant (R., pp. 11, 12) (Sup. R., pp. 68, 69).

Following the trial, appellant's counsel then, on October 31, 1957, filed *nunc pro tunc* his written motion for judgment of acquittal (R., pp. 13, 14); a hearing was had thereon, arguments of counsel were heard on November 15, 1957, and the Court reserved its deci-

sion (R., p. 46) (Sup. R., p. 80). The Court filed its Memorandum Opinion on December 31, 1957, denying appellant's motion for judgment of acquittal, and setting Monday, January 6, 1958, for the imposition of sentence (R., pp. 48-51) (Sup. R., p. 80). On said date appellant, appearing personally and by counsel, made his statements to the Court for and in his behalf and was sentenced to serve 30 days in jail, 29 of which were suspended, and to pay a fine of $300.00. Formal judgment of conviction, accordingly, was filed and entered on January 7, 1958, and appeal was taken to this Honorable Court (R., pp. 53, 54, 55).

ARGUMENT.

I.

SALES TAX ORDINANCE NO. 40 OF THE CITY OF PALMER, ALASKA, IS VALID, HAVING BEEN DULY ENACTED BY THE CITY COUNCIL AFTER REFERENDUM ACCORDING TO LAW, AND THE 1949 TERRITORIAL ENABLING ACT AUTHORIZING CITIES TO LEVY SALES TAXES WAS NOT REPEALED IN 1951.

Ordinance No. 40 of the City of Palmer under which appellant, Alfred V. Hagen, was convicted in the Magistrate's Court and again in the District Court upon appeal, constitutes a valid exercise of the governmental functions of the City of Palmer by authority conferred by Chapter 38, Session Laws of Alaska, 1949. The full text of this statute is set forth as Appendix A to this brief.

Ordinance No. 40 of the City of Palmer was enacted according to law and after referendum and approval

by the electorate of the City of Palmer at a special election held on July 10, 1951 (R., p. 16). The appellant contends in his first issue presented (Appellant's Brief, pp. 9-31) that Ordinance No. 40 is void by virtue of implied repeal of the sales tax section of Chapter 38, SLA 1949, by the enactment of Chapter 47, SLA 1951. The full text of this statute is set forth as Appendix B to this brief.

To bolster such contention, appellant has promulgated a series of self-serving statements presented as facts (Appellant's Brief, pp. 10-12), but which are not in the record, which do not conform to the record and which have no basis in truth or fact. For instance, the "matters of public record" which are set forth on pages 10 and 11 of Appellant's Brief are non-existent. The following statement appears on page 10 of Appellant's Brief:

> "It is a matter of public record that there existed a large body of public opinion in the Territory of Alaska dissatisfied with the law and claiming that its provisions led to irresponsibility and waste in municipal government."

The foregoing statement is without foundation and must necessarily depend on its proponent's interpretation of the word "large", if there was any such dissatisfaction at all.

The statement on page 11 of Appellant's Brief that:

> "It is also a matter of public record that considerable confusion resulted from this method of accomplishing repeal of the sales tax and that many Alaskan cities continued to collect sales taxes in the belief that no repeal had been intended.",

is simply not so. There is no such record; there was no such confusion because the 1951 Legislature did not repeal, nor did it even consider repeal of the sales tax enabling act (Journals of the Senate and House of Alaska, 1951 Session).[1]

The following statement (Appellant's Brief, p. 11) likewise has no basis in fact:

> "This controversy was again carried to the 1953 session of the Territorial Legislature, where the conflict was resolved in favor of strong municipal importuning for re-enactment of sales tax authority, resulting in the passage of Chapter 121, SLA 1953."

The full text of Chapter 121, SLA 1953 is set forth as Appendix C to this brief. Again, the record refutes the foregoing statement of appellant (Journals of the Senate and House of Alaska, 1953 Session).[2]

On pages 12 and 13 of his brief, appellant, by reading Chapter 121, SLA 1953 (Appendix C), together

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[1]Chapter 47, SLA 1951, originated in the Senate as Senate Bill No. 9. It would be too cumbersome here to cite the numerous pages of the journals where this legislation was considered in order to prove a negative. The comprehensive tables in the back of the journals set forth each page where Senate Bill No. 9 is mentioned. At no place in either the Senate or the House Journal is there mentioned "sales tax" or anything appertaining thereto.

[2]Chapter 121, SLA 1953 originated in the House as House Bill No. 33. In order to prove a negative, it would be too cumbersome to cite the numerous pages where this legislation was considered. The comprehensive tables in the back of the journals set forth each page where House Bill No. 33 is mentioned. At no place in either the Senate Journal or the House Journal is there mentioned any "controversy" or "municipal importuning." This Bill passed the Senate by a vote of 15 yeas and 1 nay and the House by unanimous vote of 23 yeas and 0 nays.

with another act of the 1953 Legislature,[3] which confers authority upon cities of the second class to levy sales taxes, presumes four intendments of the legislature which, if true, would have the effect of granting sales taxing authority to all first and second class cities in Alaska, and validating and confirming the collection of all sales taxes made theretofore by all first and second class cities *except* those cities of the first class[4] which had held their referendums between the periods of enactment of Chapter 47, SLA 1951 and Chapter 121, SLA 1953.

No reason is given as to why the 1953 Legislature on the one hand would enact sales taxing authority for second class cities for the first time, validating and confirming prior unauthorized sales tax ordinances of such cities, and on the other hand deny the same validation in the case of first class cities. There can be no logical reason for such legislative discrimination. Thus, it is apparent that the 1953 Legislature did not intend such discrimination *because it did not question the authority of first class cities to enact sales tax ordinances at all times from the year 1949 forward.*[5]

On pages 18 and 19 of his brief, appellant places heavy emphasis on the common use of a statement in amendatory acts that the original law is amended "to

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[3]Chapter 92, SLA 1953 (See Appendix D).

[4]Palmer is a city of the first class.

[5]Chapter 92, SLA 1953, set forth in toto in Appendix D, contains the following validation clause: "Section 3. All sales tax ordinances, otherwise valid,, which have been enacted by cities of the second class prior to the effective date of this Act under the provisions of subsection (b) of Chapter 38, Session Laws of Alaska 1949, are hereby validated and confirmed."

read as follows", and argues that since this is the language used in Chapter 47, SLA 1951 (Appendix B), all matter in the amended Act, Chapter 38, SLA 1949 (Appendix A), that is omitted in the amendment is to be considered repealed. Section 1932 of Sutherland on Statutory Construction (3rd edition) covers this matter thoroughly, stating the general rule that where the legislature employs such statement it thereby declares that the new statute is a substitute for the original act or section, and immediately following, goes on to say:

> "However, being merely a rule for determining the intent of the legislature, it is not absolute and must yield when the intent of the legislature is otherwise indicated to be to the contrary—that the provisions of the original act or section which were omitted are not repealed. Such an intent of the legislature may be indicated by a consideration of the amendatory act in its entirety, or by contemporaneous legislation on the same subject or by other circumstances surrounding the enactment of the amendment."

Sutherland on Statutory Construction (3rd ed.) Sec. 1932, and cases there cited, including the following:

State ex rel. Moose v. Turlock (Ark. 1913) 160 S.W. 516;

Wallace v. McCartney (Ark. 1923) 252 S.W. 600;

In Re Rochester Water Com'rs (N.Y. 1876) 66 N.Y. 413;

State ex rel. Board of Regents of Normal Schools v. Donald (Wis. 1916) 157 N.W. 782;

Winter v. Hindin (Del. 1926) 136 Atl. 280;
Mitchell v. Walden Motor Co. (Ala. 1937) 177 So. 151;
Bank of the Metropolis v. Faber (N.Y. 1896) 44 N.E. 779;
Bierer v. Blurock (Wash. 1894) 36 Pac. 975;
Arkansas Railroad Commission v. Stout Lumber Co. (Ark. 1923) 255 S.W. 912.

In *State ex rel. Moose v. Turlock,* supra, the facts are closely parallel with those of the case at bar. There the legislature employed the phrase "amended to read as follows" in amending a tax act, then added a new provision, but failed to restate certain portions of the act amended. In holding that a certain clause of the original act was not repealed by the amendatory act, notwithstanding the use of the phrase "to read as follows", the Court, quoting New York cases and other authority, said:

> "The effect upon a prior statute of a subsequent amendment 'so as to read as follows' is not to be determined in all cases by any fixed and absolute rule, but frequently becomes a question of legislative intent to be determined from the nature and language of the amendment, from other acts passed at or about the same time and from all the circumstances of the case. The duty of the courts is to give effect to the legislative intent rather than the literal terms of the act."

In *Arkansas Railroad Commission v. Stout Lumber Co.,* supra, the amendatory act employed the phrase "amended to read as follows" and then proceeded to amend Section 5 of the original act, which consisted

of parts A, B and C, by setting forth a provision labeled "D" without restating the provisions of parts A, B and C. The Court held that provision D was not substituted for the Section 5 as originally enacted but added thereto, in view of the intention of the legislature, as expressed in the language used and as determined by other acts enacted at the same session.

It is well settled that a law is not presumed to be repealed by implication; conversely, the presumption is against an implied repeal.

Frost v. Wenie, 157 U.S. 46;
U. S. v. Greathouse, 166 U.S. 601;
U. S. v. Noce, 268 U.S. 613;
Pullen v. Morganthau, 73 F.(2d) 281;
Stewart v. U. S., (CCA 9th 1939) 106 F.(2d) 405;
Lewis v. U. S., 244 U.S. 132.

The entire problem of determining the extent to which existing legislation is repealed by subsequent statutes ultimately resolves itself into one of legislative intent.

Mathews v. Murchison, (CCA 9th 1927) 12 Fed. 760;
Continental Ins. Co. v. Simpson, (CCA 4th 1925) 8 Fed.(2d) 439;
Posadas v. National City Bank of New York, 296 U.S. 497 (1936).

The following is quoted from Crawford on Statutory Construction and Interpretation of Laws (1940 ed.), Sec. 310, page 630:

The Presumption Against Implied Repeal—"As is thus apparent, the courts do not look with favor upon implied repeals, and the presumption is always against the intention of the legislature to repeal legislation by implication. The absence of an express provision in a statute for the repeal of a prior law gives rise to this presumption, which is accentuated where the various statutes were enacted at the same session of the legislature. Consequently, as we have already indicated, the intent to repeal must clearly appear, and such a repeal will be avoided if at all possible."

Sutherland on Statutory Construction, Vol. 1 (3rd ed.), Sec. 2007, has this to say on the subject of applying the rules of statutory interpretation to repealing statutes:

"Repealing statutes are subject to the general rules of statutory construction applicable to all legislative enactments. Thus, in determining whether or not a repeal has been effectuated, the environment, association and character of the statute in its field of operation, the history of previous legislation, the legislative history of the act, and the nature of the defect sought to be remedied by its enactment are all important factors to be considered by the courts. Likewise, the rules pertaining to mandatory and permissive verbs, and the time of taking effect may be of conclusive significance. The courts will not ascribe to the legislature an intent to create absurd or harsh consequence, and so an interpretation avoiding absurdity is always to be preferred.

"But it must be observed in the interpretation of repealing legislation, just as in the interpreta-

> tion of all legislation, that no single criterion can be conclusive of whether a repeal has been effectuated. Instead, consideration must be given to them all. Each factor must be given its own evaluation, all must be weighed against one another, and, most important of all, the rules must be applied with reasonableness. It is only upon this basis that certainty, justice and uniformity can be achieved."

The consequences would be harsh indeed, had the 1951 Legislature repealed the sale-taxing authority of Alaskan cities, and the ultimate in absurdity would have been reached, had such repeal been accomplished by implication, by mere omission, rather than express repeal, and by concealing the intent to repeal in failing to so state the fact in the title of the amendatory act. Irreparable damage would have been done to Alaska's first class cities, most of which were dependent on sales tax revenues to support the usual governmental functions and improvements ranging from garbage collection to the financing of sewers, water systems and street paving projects. Faced with the postwar influx of people into Alaska, and their demands for more municipal services and improvements, most Alaskan cities enacted sales tax ordinances promptly upon passage of the enabling act of 1949 (Appendix A). The author of this brief, who is in his fifteenth continuous year of residence in Alaska, knows of no instance where an Alaskan city has abandoned the sales tax, and so states the fact to be. Indeed, every city which had adopted a sales tax measure prior to 1951 continued to collect the tax during 1951, 1952 and 1953. Certainly, the

1951 Legislature did not intend to create the absurd consequence of destroying a prime source of revenue for these cities by means of an implied repeal of their sales tax enabling legislation.

Likewise, there could be no logical reason for the 1953 Legislature to discriminate against certain first class cities, including Palmer (as appellant contends), by ratifying all sales taxes previously levied and collected except in those cities where the referendum was held after enactment of Chapter 47, SLA 1951 (Appendix B).

The obvious and only purpose of the ratification clause of the 1953 act (Sec. 2, Chapter 121, SLA 1953, Appendix C herein) was to ratify all sales taxes levied and collected pursuant to valid ordinances—that is to say, ordinances enacted pursuant to referendum and with proper observance of procedural requirements.

Sales Tax Ordinance No. 40 of the City of Palmer met these requirements, and so stated the fact in the preamble thereof (R., p. 16). It is noteworthy that the above-mentioned ratification clause applies to "municipalities", i.e., cities of all classes (see Appendix C, last section). It applies equally to cities of the first and second classes, and ostensibly could have been included in the act principally for the benefit of second class cities whose authority to levy sales taxes in any form may have been in doubt, but who nevertheless had been doing so. There is nothing in the act of 1953 (Appendix C), or elsewhere, to indicate that the legislature thought the sales tax enabling legislation of 1949 (Appendix A) had been repealed

or that first class cities (only) which enacted ordinances after passage of Chapter 47, SLA 1951 (Appendix B) were to be left "holding the bag" for sales taxes collected in good faith, in the public interest alone, and to enable them to perform their true functions as local government organs.

In the case of the City of Palmer, it *is* a matter of public municipal record (to borrow one of appellant's perquisites in quoting "public records") that from the time of its incorporation as a first class city in the year 1951 to the year 1955, which includes the "period of repeal" as appellant designates it, the sales tax was its sole source of revenue. There was no property tax or other tax levied. Also of record is the fact that in 1952 a portion of the City's annual sales tax revenue was pledged for twenty years thence toward payment of a municipal bond issue of $337,000.00 for construction of the City water system. The appellant, Alfred V. Hagen, as a member of the City Council, voted not only for the enactment of Ordinance No. 40 (see Stipulation No. 6, R., p. 15), but for such future pledge of sales tax moneys as well, with unanimous concurrence of the other councilmen!

Were its sales tax ordinance to be held invalid, consequences to the City of Palmer would be disastrous. It is a fast growing, modern Alaskan city, and in 1957 was granted an award by LOOK magazine in recognition of progress achieved by its citizens in improving the homes and residential areas of the community. In the past six years it has constructed a $500,000 water system. In the past year it has paved two miles of its

city streets. It is now planning an urgently needed extension to its sewer system. Its schools are overcrowded, and the school district of which it is a part is now constructing expensive additions to the schools. Most of this has to be paid for from sources of local taxation. The City has a bonded indebtedness of $530,000 which is near to the maximum bonded indebtedness allowed by law upon the basis of the total assessed valuation of its real and personal property. It depends heavily on its sales tax revenue in performing its municipal functions and in paying off its bonded debt, above mentioned. Had the 1951 Legislature repealed the authority upon which it and other cities similarly situated levied their sales taxes, municipal progress in Alaska, at the least, would have been critically impaired. It is not reasonable that the legislature could have intended such repeal and such consequences.

The title of the 1951 act (Appendix B) negates, *per se,* any intent to legislate upon the subject of sales tax. Alaska, along with many States, has a constitutional provision concerning titles to its statutes. Section 8 of the Organic Act (ACLA 1949, Section 4-3-1) provides:

> No law shall embrace more than one subject which shall be expressed in its title.

The 1949 Legislature expressed the subject in the title when it enacted Chapter 38, SLA 1949 (Appendix A), granting Alaskan cities the authority, for the first time, to levy sales taxes, as follows:

> Chapter 38, SLA 1949
>
> *An Act* to empower city councils, pursuant to referendum, to levy sales taxes within their re-

spective municipalities; and amending subsection Ninth of Sec. 16-1-35, ACLA 1949.

The above statute made no change in the existing law, which pertained only to a general tax on real and personal property for school and municipal purposes. It added the sales tax authority to the existing law as subsection "(b)" thereof, to contain two subjects, namely, a general tax on real and personal property (subsection (a)) and a sales tax on sales and services (subsection (b)).

The title of the 1951 act (Appendix B) reads as follows:

Chapter 47, SLA 1951

An Act amending subsection Ninth of Sec. 16-1-35, ACLA 1949, as amended by Chapter 38, SLA 1949, pertaining to a general tax for school and municipal purposes.

This statute made no reference to the sales tax portion of the law (subsection (b)) and "sales tax" is not mentioned in its title. Its purpose was to meet the needs of booming municipalities by increasing the maximum allowable general tax levy on real and personal property from 2% to 3% and not to reduce municipal revenues in a period of rising costs and inflation. Since the subject of sales tax is not embraced in the title, it follows that (1) the legislature did not intend to tamper with the sales tax subsection, or (2) assuming *arguendo* that it did so intend, it violated Section 8 of the Organic Act (supra) in not expressing the subject of sales tax in the title.

Sutherland on Statutory Construction (3rd ed.), Vol. 1, Sections 1702 and 1707, outlines the purpose and effect of the constitutional provision concerning titles as follows:

> The constitutional requirement that every law shall have but one subject which shall be expressed in the title was not imposed to hamper or impede the legislative process. It was not designed as a loophole of escape from, or a means for the destruction of legitimate enactments. The number of statutes required to effect a given purpose is not to be needlessly multiplied, nor is the scope of the required single subject to be unduly restricted. The dominant objective to the provision is to insure the titling of legislative acts in a manner that will give reasonable notice of the purview to the members of the assembly, and to the public. All that is necessary is that anyone interested in or affected by the subject matter of the bill be put upon inquiry. *The general test is whether the title is uncertain, misleading or deceptive to the average reader,* and if the court feels that the title is sufficient to direct a person of ordinary, reasonable inquiring mind to the body of the act, compliance with the constitution has been effected. (Emphasis supplied.)
>
> *Aside from the invalidity that occurs when a statute is duplicitous, a statute will be invalid if its title completely fails to apprise legislator or public of the nature, scope, or consequences of its operation.* (Emphasis supplied.)

It is manifest that nothing in the title of the 1951 act (supra) would apprise the public or even a legislator of the repeal of the sales tax law, to say nothing

of the nature, scope or consequences of the operation of such repeal. Hence, the sales tax enabling act of 1949 (Appendix A) was not repealed and Ordinance No. 40 of the City of Palmer enacted thereunder, pursuant to referendum duly held, wherein more than 55 percent of the qualified voters approved, is a valid exercise of the taxing powers of the City.

That the repeal of the original ordinance, No. 10, and its re-enactment as Ordinance No. 40 with only two or three minor changes[6] does not require a second referendum is academic.

The District Court for the District of Alaska, Third Division, upheld such repeal and re-enactment recently in *The Town of Seward v. Emma Lu Garrett d/b/a New Northern Bar* (see Appendix E). That was a criminal case brought under a section of the Seward ordinance similar to that under which appellant was charged in the case at bar. The charge was the same, namely, failure to file a tax return upon the date required by the ordinance. The facts are quite similar to those before the District Court in the case at bar, the principal difference being that in *Town of Seward v. Garrett,* the defendant failed both in collecting the tax from the public and in filing the monthly return, while in the case at bar, the appellant *did collect the tax from the public but retained possession of the same for months, and failed to file a return or account for such collections to the City* (Sup. R., p. 75). The

[6]Changes were: The scale was changed to start at 25 cents instead of the former 34 cents, and certain minor changes in Section 4 as to sales exempted from the tax.

opinion in the *Seward* case is set out in Appendix E not particularly for its value as authority in this case at bar, but also because it illustrates the problem of Alaskan cities in law enforcement and the deliberations of a local court, which is in position to hear and know the mischief which might be wrought upon Alaskan municipalities by venal and litigious pettifogs.

Another act of the 1951 Legislature, Chapter 96, SLA 1951 (Appendix F), when read together with Chapter 47, SLA 1951 (Appendix B), refutes with finality all argument that the 1951 Legislature intended to repeal existing sales tax legislation. It is noteworthy that this act was passed by the same legislature on March 24, 1951, *three days after* passage of Chapter 47, SLA 1951. This later act granted both independent school districts and incorporated school districts, for the first time in Alaskan history, authority to levy sales taxes within their corporate boundaries. It is also noteworthy that subsection B, the sales tax portion of this Act, is identical in verbiage with subsection (b) of Chapter 38, SLA 1949 (Appendix A) except for the necessary substitution of names and excepting the last sentence thereof which reads:

> "It is further provided that no tax shall be levied or imposed hereunder upon either sales or services made within any incorporated municipality or school district which is a part of any independent school district where such incorporated municipality levies a consumer's sales tax upon the sales price of either or both retail sales and services made within it."

Since many school districts in Alaska contain incorporated municipalities within the school district boundaries, the foregoing speaks for itself and no stronger proof of legislative intent *not to change the existing sales tax law* could one expect to find.[7] Certainly the legislature did not intend to withdraw sales taxing authority from municipalities on the one hand and grant the same to school districts on the other; and *a fortiori* in abject contradiction of itself, forbid the levying of the sales tax by school districts in areas *where a city already was making such levy.*

It is to be conceded, as appellant states on pages 26-31 of his brief, that the authorities cited in the Memorandum Opinion of the District Court (R., pp. 48-51) do not constitute "cases in point" as to the validity of the City of Palmer's sales tax ordinance.

The Court denied defendant's motion for judgment of acquittal, based on the single question of the validity of the sales tax ordinance (R., pp. 13, 14), which it could do, and did without citing any authority. In fact, the Court stated in its Memorandum Opinion *"that it is not necessary for the Court to determine the validity of the original or amendatory statutes or the ordinances here in question"* (emphasis supplied) (R., p. 50). Whether the Court was correct in this statement, it did in fact refuse to rule upon the validity of the legislation, and did in fact deny the defendant's motion.

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[7]The City of Palmer is contained within the boundaries of the larger entity, Palmer Independent School District.

Certainly the Court was aware the law of estoppel does not generally apply in criminal cases, nor specifically in this case. The language used and the three cases cited are *obiter dicta* merely. It is apparent the Court's purpose here was to comment on the moral and equitable aspects of the conduct of the defendant, and it did so in its Memorandum Opinion (R., pp. 48-51) with the following language:

> "When the defendant collected the taxes he became the agent of the City of Palmer and as such is obligated to account to the City, as principal . . ." (R., p. 50).

Then followed the citations on the subject of agency of which the appellant complains. The Court, had it been more blunt, might have said instead, "There is agency involved here and the withholding of a principal's money under certain circumstances becomes embezzlement." The Court's dictum is especially understandable in view of the fact the appellant had been convicted previously of the same offense and that in one instance he had withheld municipal sales tax moneys and failed to file his sales tax returns for a period of seven months! (R., pp. 15, 49; Sup. R., pp. 81, 89, 90).

II.

APPELLANT'S CONTENTION THAT THE JUDGMENT OF CONVICTION IS INVALID BECAUSE OF A FATAL VARIANCE WITH THE COMPLAINT UPON WHICH IT IS BASED AND BECAUSE IT IS UNSUPPORTED BY THE STIPULATED FACTS IN THIS CASE IS WITHOUT MERIT.

The crime of which the appellant was convicted in the District Court, not having been indictable at common law, is one which falls into a class of petty or minor offenses.

Callan v. Wilson, 127 U.S. 540;
District of Columbia v. Clawans, 300 U.S. 617.

Section 66-9-14, ACLA 1949, provides as follows:

> That the indictment is sufficient if it can be understood therefrom:
>
> First. That it is entitled in a court having authority to receive it, though the name of the court be not accurately stated;
>
> Second. That it was found by a grand jury of the political division in which the court was held;
>
> Third. That the defendant is named, or if his name can not be discovered, that he is described by a fictitious name, with the statement that his real name is to the jury unknown;
>
> Fourth. That the crime was committed within the jurisdiction of the court;
>
> Fifth. That the crime was committed at some time prior to the finding of the indictment, and within the time limited by law for the commencement of an action therefor;
>
> Sixth. That the act or omission charged as the crime is clearly and distinctly set forth in ordi-

> nary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended; Seventh. That the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment, upon a conviction, according to the right of the case.

The information (styled "complaint" under local practice) meets all the foregoing requirements of a sufficient indictment, excepting, of course, part "Second" which applies to indictments only, and not informations.

In *Simpson v. U. S.,* 289 Fed. 188 (CCA 9th 1923), this Court held:

> An indictment is sufficient where it advises the defendant with reasonable certainty of the crime with which he is charged, where its meaning is plain, where a person of ordinary intelligence cannot be misled as to the nature of the charge, and where the averments are sufficient to enable the defendant to prepare his defense and, in the event of acquittal, to plead the judgment in bar of a second prosecution of the same offense. (Citing *Williamson v. U. S.,* 207 U.S. 425 and *Burton v. U. S.,* 202 U.S. 344.)

It is often recognized that less rigid nicety is exacted in accusations for misdemeanors than where felonies are charged.

> *U. S. v. Mills,* 7 Pet. (U.S.) 138;
> *State v. Bennett,* 14 S.W. 865.

Section 6 of Ordinance No. 40 requires that sales tax returns shall be filed each month with the City Clerk, by every seller, *on or before* the 10th day of the following month (R., p. 25). With reference to the fifth clause of Sec. 66-9-14, ACLA 1949 (supra), the crime was committed *ipso facto* at the end of the 10th day of September 1956, when the accused had failed to file his sales tax return *on or before* said date. Hence, the crime was committed prior to the filing of the information on November 15, 1958. Referring to the sixth clause of Sec. 66-9-14, ACLA 1949 (supra), the complaint sets forth the omission of the accused clearly and distinctly and in ordinary and concise language as follows:

> The said Alfred V. Hagen d/b/a Valley Theatre in the City of Palmer, Alaska and within the jurisdiction of this Court, did, wilfully
>
> Fail to file a sales tax return for retail sales and service made and performed during the month of August, 1956, in violation of Section No. 6, Ordinance No. 40, and *contrary to said Ordinance of the said City of Palmer, in such case made and provided,* and against the peace and dignity of the People. (R., p. 6; emphasis supplied.)

There is only *one* August 1956, there can be only *one* prosecution for failure to file tax returns therefor, there can be only *one* point in time when the accused could have come into violation of the ordinance, namely, at the end of the 10th day of September, as provided by Ordinance No. 40, which he formerly en-

forced against others as a member of the City Council and as Mayor of the City of Palmer (R., p. 15) (Sup. R., p. 82). It is certain that the appellant was able to understand what was intended, within the meaning of the sixth clause mentioned above. With reference to the seventh clause of Sec. 66-9-14, ACLA 1949, the Court pronounced judgment "according to the right of the case" by holding "that the defendant had been convicted of the offense as charged in the complaint" (See Judgment, R., pp. 53, 54.)

Appellant contends (Appellant's Brief, pp. 32, 33, 34) there is a "fatal variance" between the complaint and the judgment on the one hand and the facts as stipulated on the other.

Though there are exceptions as to matters of jurisdiction, it is a general rule of law that variance cannot be taken advantage of after verdict.

People v. Formosa, 30 N.E. 492;
State v. Gibson, 85 S.E. 7;
State v. Meyers, 18 S.E. 892.

The appellant was represented by counsel at all stages of this case, beginning with the Magistrate's Court in the City of Palmer (R., pp. 8-16). While counsel for appellant filed motions to disqualify the magistrate and to quash the warrant of arrest and dismiss the complaint (R., pp. 8, 9), at no time either in the Magistrate's Court or in the District Court was motion made or objection taken to the sufficiency of the charge as stated in the complaint.

It follows that if the complaint is found to be sufficient and the stipulated facts found adequate, there can be no fatal variance with the judgment which makes a finding of guilt "as charged in the complaint" (R., p. 54).

III.

THE MOTION FOR JUDGMENT OF ACQUITTAL WAS NOT SUBMITTED UPON STIPULATED FACTS; THE FINDING OF GUILT BY THE DISTRICT COURT WAS NOT "SUMMARILY" DONE; THE APPELLANT WAS NOT ENTITLED TO A TRIAL BY JURY; AND THE APPELLANT WAS NOT DEPRIVED OF DUE PROCESS OF LAW.

The motion for judgment of acquittal in the District Court had no connection with the stipulated facts, which were made solely *in order to avoid putting on testimony* (R., pp. 14, 48, 54; Sup. R., pp. 64, 65, 66). At the trial on October 23, 1957, appellant's counsel informed the Court as follows:

> *Mr. Tulin.* If the Defendant were to take the stand, it certainly would be a matter for credibility but he is not taking the stand. There is no need of taking the stand. It turns on a question of law, which I propose to argue. (Sup. R., pp. 66, 67.)

Thus, appellant stipulated to the facts of the case, declining to take the witness stand or present any evidence, and elected to rely upon the question of the validity of Ordinance No. 40 as his sole defense. Stipulation of fact No. 3 was an unqualified admission of the charge in the complaint as follows:

> 3. That the defendant failed to make timely filing of his sales tax return as *charged in the complaint* . . . (emphasis supplied, R., pp. 14, 48).

Hence, the District Court did not "summarily find appellant guilty", but made such finding pursuant to formal trial upon stipulated facts.

The appellant is not entitled to a jury trial. The right to jury trial in cases appealed from Municipal Courts consistently has been denied by the District Courts of Alaska. The Amended Uniform Rules of the District Court for the District of Alaska (effective October 1, 1957) provides:

> Rule 18. *Appeals from Magistrate's Court: Jury.* Cases appealed to the district court from the magistrate's court of a city or a town shall be tried by the court without a jury, except in those cases where jury trials must be given as a matter of constitutional or statutory right.

This rule has been carried over from previous compilations of the rules, and in the Courts of Alaska offenses as created by city ordinances in Alaska are considered petty offenses; and no provision has been made for trial by jury in the City Magistrate's Court despite the provisions of the Sixth Amendment to the Constitution of the United States.

Were Sec. 66-13-2, ACLA 1949, which appellant urges as requiring jury trial in this case (Appellant's Brief, p. 35) held to be mandatory upon all criminal cases in Alaska, then jury trials would have to be pro-

vided not only in cases appealed to the District Court from City Magistrate's Courts, but in all cases in the Municipal Courts as well, even in petty cases involving the violation of traffic regulations. For there is no express legislation on the subject extant in Alaska.

In this case, there was no issue of fact involved, the facts having been agreed upon and stipulated to; and no evidence having been presented there was nothing for a jury to try.

U. S. v. Harris, 106 U.S. 629;
Case of Supervisors v. Kennicott, 103 U.S. 554;
District of Columbia v. Clawans, 300 U.S. 617;
Schick v. U. S., 195 U.S. 65.

This case involves a petty offense which does not require a jury trial.

In any event, the appellant waived a jury trial by going to trial without demanding it.

City of Fort Scott v. Arbuckle (Kan. Sup. Ct. 1948), 187 Pac. (2d) 348.

CONCLUSION.

At every stage of this case, the appellant was represented by skilled counsel, both in the City Magistrate's Court and the District Court. He was not lacking in means to enforce every legal right the law affords him. He stipulated to the facts in the District Court, admitting unqualifiedly the charge against him and based his sole defense on the question of the

validity of the ordinance under which the charge was brought. The ordinance being valid and the judgment being in accord with the evidence, i.e., the stipulated facts, the judgment of the District Court should be sustained.

Dated, Palmer, Alaska,
December 8, 1958.

Respectfully submitted,
JOHN D. SHAW,
City Attorney of the City of Palmer, Alaska,
Attorney for Appellee.

(Appendices Follow.)

Appendices.

Appendix "A"

Chapter 38, SLA 1949

AN ACT to empower City Councils, pursuant to referendums, to levy sales taxes within their respective municipalities; and amending subsection Ninth of Sec. 16-1-35 ACLA 1949.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That subsection Ninth of Sec. 16-1-35 ACLA 1949 is hereby amended to read as follows:

Ninth: (a) GENERAL TAX FOR SCHOOL AND MUNICIPAL PURPOSES. To assess, levy, and collect a general tax for school and municipal purposes not to exceed two per centum of the assessed valuation upon all real and personal property and to enforce the collection of such lien by foreclosure, levy, distress and sale. Provided, however, that all property belonging to the municipality or the Territory, and the household furniture of the head of the family or a householder not exceeding Two Hundred Dollars ($200.00) in value, as well as all property used exclusively for religious, educational, charitable purposes and the property of any organization, not organized for business purposes, whose membership is composed entirely of the veterans of any wars of the United States, or the property of the auxiliary of any such organization and all monies on deposit, shall be exempt from taxation. Provided, further, that if any organization composed of veterans or its auxiliary derives any rentals or profits from any such property owned by it or them, such property shall not be exempt. Provided, further, that the laws excepting cer-

tain property from levy and sale on execution shall not apply to taxes or to the collection of the same, or to any taxes levied by a municipal corporation.

(b) CONSUMER'S SALES TAX. To levy and collect a consumer's sales tax not exceeding two percentum of the sales price on all retail sales and services made within the municipality; provided, that the consent of the qualified voters of the municipality is first obtained through a referendum vote at a general or special election, upon ballots which clearly present the proposition as to whether such sales tax shall be authorized within the municipality. The ballot shall also set forth whether the tax is to be levied for general revenue for the municipality or for a special purpose, and if for a special purpose, same shall be specified on the ballot. If fifty-five percent (55%) or more of the votes cast in said referendum are in the affirmative, the council may thereafter enact such a tax in the nature of a levy upon buyers but with imposition upon sellers of the obligation of collecting same at the time of sale or at time of collection with respect to credit transactions, and transmit same to the municipality. The sole purpose of this subsection is to enable cities, with the consent of the residents thereof, to impose sales taxes, and that although such method of taxation be established within a city, the council may at any time abandon same. It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum.

Approved March 14, 1949.

Appendix "B"

Chapter 47, SLA 1951

AN ACT amending subsection Ninth of Sec. 16-1-35 ACLA 1949, as amended by Chapter 38 SLA 1949, pertaining to a general tax for school and municipal purposes.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That subsection Ninth of Sec. 16-1-35 ACLA 1949, as amended by Chapter 38 SLA 1949, is hereby amended to read as follows:

Ninth: (a) GENERAL TAX FOR SCHOOL AND MUNICIPAL PURPOSES. To assess, levy, and collect a general tax for school and municipal purposes not to exceed three per centum of the assessed valuation upon all real and personal property, and to enforce the collection of such lien by foreclosure, levy, distress and sale. Provided, however, that all property belonging to the municipality or the Territory, and the household furniture of the head of the family or a householder, not exceeding Two Hundred Dollars ($200.00) in value, as well as all property used exclusively for religious, educational, charitable purposes and the property of any organization, not organized for business purposes, whose membership is composed entirely of veterans of any wars of the United States, or the property of the auxiliary of any such organization, and all monies on deposit, shall be exempt from taxation. Provided, further,

that if any organization composed of veterans or its auxiliary derives any rentals or profits from any such property owned by it or them, such property shall not be exempt. Provided further, that the laws excepting certain property from levy and sale on execution shall not apply to taxes or to the collection of the same, or to any taxes levied by a municipal corporation.

Approved March 21, 1951.

Appendix "C"

Chapter 121, SLA 1953

AN ACT to empower city councils to levy a general tax for school and municipal purposes, and to levy sales taxes within their respective municipalities; and amending subsection Ninth of Section 16-1-35 ACLA 1949, as amended by Chapter 47, Session Laws of Alaska, 1951, and validating sales taxes already collected, and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That subsection Ninth of Sec. 16-1-35* ACLA 1949 is hereby amended to read as follows:

Ninth: (a) GENERAL TAX FOR SCHOOL AND MUNICIPAL PURPOSES. To assess, levy, and collect a general tax for school and municipal purposes not to exceed three per centum of the assessed valuation upon all real and personal property, and to enforce the collection of such lien by foreclosure, levy, distress and sale. Provided, however, that all property belonging to the municipality or the Territory, and the household furniture of the head of the family or a householder, not exceeding Two Hundred Dollars ($200.00) in value, as well as all property used exclusively for religious, educational, charitable purposes and the property of any organization, not organized

*Sec. 16-1-35, ACLA 1949: "Powers of Council. The council (of a city of the first class) shall have and exercise the following powers: * * * *Ninth:*

for business purposes, whose membership is composed entirely of the veterans of any wars of the United States, or the property of the auxiliary of any such organization and all monies on deposit, shall be exempt from taxation. Provided, further, that if any organization composed of veterans or its auxiliary derives any rentals or profits from any such property owned by it or them, such property shall not be exempt. Provided further, that the laws excepting certain property from levy and sale on execution shall not apply to taxes or to the collection of the same, or to any taxes levied by a municipal corporation.

(b) CONSUMER'S SALES TAX. To levy and collect a consumer's sales tax not exceeding two percentum of the sales price on all retail sales, rents and services, made within the municipality; provided that the consent of the qualified voters is first obtained through a referendum vote at a general or special election, upon ballots which clearly present the proposition as to whether such sales tax shall be authorized within the municipality. The ballot shall also set forth whether the tax is to be levied for general revenue for the municipality or for a special purpose, and, if for a special purpose, same shall be specified on the ballot. If a majority of the votes cast in said referendum are in the affirmative, the council may thereafter enact such tax in the nature of a levy upon buyers but with imposition upon sellers of the obligation of collecting same at the time of sale or at time of collection with respect to credit transactions, and transmit same to the municipality. No such sales tax

proposition shall be presented to the voters more than once in any twelve months. The sole purpose of this subsection is to enable cities, with the consent of the residents thereof, to impose sales taxes, and although such method of taxation be established within a city, the council may, at any time abandon same. It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum.

Section 2. All sales taxes heretofore levied and collected by municipalities within the Territory of Alaska, pursuant to ordinances which were valid at the time of their enactment, are hereby ratified and confirmed.

Section 3. (Emergency clause)

Approved March 30, 1953.

Appendix "D"

Chapter 92, SLA 1953

AN ACT to empower Second Class Cities, pursuant to referendums, to levy sales taxes; amending subsection Sixth of Section 16-2-5 ACLA 1949; validating and confirming sales tax ordinances enacted prior to the effective date of this Act; and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. Subsection Sixth of Section 16-2-5 ACLA 1949 is amended to read as follows:

Sixth: (a) GENERAL TAX FOR SCHOOL AND MUNICIPAL PURPOSES. To assess, levy and collect a general tax for school and municipal purposes, not to exceed three per centum of the assessed valuation upon all real and personal property and to declare such tax with penalty a lien upon such property, and to enforce the collection of such lien by foreclosure, levy, distress and sale, in the manner provided for the collection of taxes in municipal corporations of the first class, and all the provisions of the laws of the Territory relative to the levy and collection of taxes in cities of the first class shall apply with full force and effect to incorporated cities of the second class; Provided, however, that all property belonging to the municipality, all property used exclusively for religious, educational or char-

itable purposes, and the household furniture of the head of a family or householder, not exceeding Two Hundred Dollars ($200.00) in value, shall be exempt from such tax; Provided, further that the laws exempting certain property from levy and sale on execution shall not apply to said taxes or the collection of the same.

(b) CONSUMER'S SALES TAX. To levy and collect a consumer's sales tax not exceeding two percentum of the sales price on all retail sales, rents and services made within the municipality; provided, that the consent of the qualified voters of the municipality is first obtained through a referendum vote at a general or special election, upon ballots which clearly present the proposition as to whether such sales tax shall be authorized within the municipality. The ballot shall also set forth whether the tax is to be levied for general revenue for the municipality or for a special purpose, and, if for a special purpose, same shall be specified on the ballot. If a majority or more of the votes cast in said referendum are in the affirmative, the council may thereafter enact such a tax in the nature of a levy upon buyers but with imposition upon sellers of the obligation of collecting same at the time of sale or at time of collection with respect to credit transactions, and transmit same to the municipality. The sole purpose of this subsection is to enable cities, with the consent of the residents thereof, to impose sales taxes, and that although

such method of taxation be established within a city, the council may at any time abandon same. It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum.

Section 2. No such sales tax proposition shall be presented to the voters more than once in any twelve months.

Section 3. All sales tax ordinances, otherwise valid, which have been enacted by cities of the second class prior to the effective date of this Act under the provisions of subsection (b) of Chapter 38, Session Laws of Alaska 1949, are hereby validated and confirmed.

Section 4. (Emergency clause)

Approved March 28, 1953.

Appendix "E"

In the District Court for the District of Alaska

Third Division

Cr. No. 3501

The Town of Seward,
a Municipal Corporation,
Plaintiff,

vs.

Emma Lu Garrett, d/b/a
New Northern Bar,
Defendant.

TRANSCRIPT OF OPINION

On Tuesday, March 11, 1958, in open court at Anchorage, Alaska, the Honorable J. L. McCarrey, Jr., U. S. District Judge, rendered the following opinion:

The Court. The court wishes to render its oral opinion in the case of Town of Seward, a Municipal Corporation, Plaintiff, vs. Emma Lu Garrett, d/b/a New Northern Bar, Defendant, Criminal No. 3501.

This is an appeal from a judgment entered by the City Magistrate on the 19th day of September, 1956,

and comes before the court upon the record. The court below adjudged the defendant guilty of the violation of Section 6(a) and 12 of Ordinance 267 of the City of Seward and fined $50.00 and costs.

It was agreed by counsel that the only issue to be determined by this court on appeal would be the validity of Ordinance 267 under facts that I will hereafter state orally since the defendant has paid the taxes assessed under the ordinance as evidenced by Defendant's Exhibit A in the sum of $668.67.

A background of the facts in the case will disclose that pursuant to statutory authority found in 16-1-36 ACLA 1949, as amended by Chapter 38, SLA 1949, the City of Seward passed a sales tax in conformance therewith and after apparent full compliance with the law (supra) on the 23d day of September, 1949, this ordinance was adopted on the 4th day of June, 1956. In the preamble the ordinance provided that, and I quote:

> "WHEREAS, a special election was called and held in conformity and under the provisions of subsection Ninth, Section 16-1-35 ACLA 1949, as amended by Section 1, Chapter 38 of the Session Laws of Alaska, 1949, on the 8th of September, 1949, and at said election more than 55 percent of the qualified voters of the City of Seward, Alaska, voting thereat voted in favor of a 2 percent consumer's sales tax on retail sales and services made within the City of Seward, and
>
> WHEREAS, the City Council of the City of Seward on the 23d day of September, 1949, enacted a consumer's sales tax by the passage of Tax Ordinance No. 190-A for the purpose of providing

additional funds for the construction and operation of more adequate educational and public health facilities and to provide for betterment of the schools and to pay for such school obligations, public health and sanitation, and

WHEREAS, the City Council of the City of Seward has determined that Tax Ordinance No. 190-A should be completely revised, NOW THEREFORE,

BE IT ORDAINED by the City Council of the City of Seward, Alaska, as follows: * * *''

and thereafter they set forth the ordinance in detail among which is Section 5 which provides for exceptions and exemptions and then at the end of Section 12 the ordinance provides as follows, and I quote:

"Ordinance No. 190-A is hereby expressly repealed, and all ordinances and parts of ordinances in conflict with this ordinance are hereby repealed, provided however, that any taxes now due and payable under said Ordinance 190-A shall be paid as therein provided.

This ordinance shall take effect and be in full force from and after the date of its passage and approval.

This ordinance passed and approved this 4th day of June, 1956."

Briefs have been submitted by respective counsel. Counsel for the appellant, defendant, contends that Ordinance 267 is invalid on two grounds: First, because the second ordinance, namely, 267, was not resubmitted by referendum to the voters for approval, and, second, that the tax fails to comply with the requirement of uniformity in that certain exemptions were allowed contrary to statutory authority.

Counsel for the City, appellee, contends that once the proposal and proposition had been submitted to the electorate of the City of Seward for their approval, and the approval was obtained in conformance with statutory requirements, that it was not necessary for the City Council to resubmit it to the taxpayers of the City of Seward for further authorization. In support of its contention they rely upon Section 9 subsection (b) as their authority which provides in part as follows, and I quote: "The sole purpose of this subsection is to enable cities, with the consent of the residents thereof, to impose sales taxes, and that although such method of taxation be established within a city the council may at any time abandon same", and thereafter additional recitation follows but which the court will not recite because of its language not being applicable to this problem.

It is to be noted that we have an Alaskan case on this point. That is the case of Valentine vs. City of Juneau, found at 36 F2d 904 and 906. In that case the court was construing a resolution of the city council of Juneau, Alaska, which excluded all bonds, monies, and choses in action, including money on deposit from assessment and taxation pursuant to a statutory provision which is now Section 16-1-35 ACLA 1949 as amended by Chapter 38, SLA 1949, subsection 9(a), however, the provisions we are concerned about in this particular problem are found in subsection 9(b). In that case the judge stated and I quote:

> "It is well settled, of course, that the Legislature of a state or territory may classify property for

purposes of taxation and may exempt particular property from taxation in the absence of some limitation contained in the constitution, or other organic law. But the authority of a municipal corporation to allow such exemptions, unless expressly conferred by law, has very generally been denied."

Despite this rather strong language the court decided in the Valentine case that the omission of exempted property from the assessment tax roll did not effect the validity of the taxes as a whole, wherein it stated as follows, and I quote:

"Most assuredly, it cannot be said that the omission of property from an assessment roll, through error of judgment of law, will invalidate all taxes, thus practically putting an end to the operations of the Government."

Deleting a portion thereof and then thereafter further quoting Judge Cooley I quote:

" 'It has been decided in a number of cases that accidental omissions from taxation, of persons or property that should be taxed, occurring through the negligence or default of officers to whom the execution of the taxing laws is entrusted, would not have the effect to vitiate the whole tax' ".

Again in the case in the opinion I find the following language:

"Again, it is not at all clear that the appellant did not have a plain, speedy, and adequate remedy at law. If a decision of the board of equalization was not subject to review by the court of the territory in a direct proceeding, mandamus was

> a proper remedy to compel the assessment and taxation of the omitted property."

Now, applying the Valentine case to the one at issue: Assuming that the City of Seward did allow certain exemptions contrary to the law under the authority of the Valentine case, that would not vitiate the law itself since any aggrieved taxpayer would have a right by way of mandamus to enforce a collection of taxes against that category of property which the City Council unlawfully exempted.

Now, referring then to the other point of the appellant, Number 1, the tax proposal was not resubmitted by referendum to the voters for approval. Although the tax originally was referred to the voters on referendum the City Council thereafter adopted an ordinance and later abandoned the same and still at a later time enacted another ordinance known as 267, supra.

I am of the opinion and hereby find that the City of Seward having once complied fully with the statute through the referendum and although Ordinance 267 is confusing in that one portion of the ordinance which refers to a "revision" of Ordinance 190-A, while another portion of the ordinance refers to a complete "repeal" thereof, that this authority remained with the City Council of the City of Seward and it was not necessary, therefore, for them to remand or to submit it back to the voters of the City of Seward for further authorization.

I, therefore, find that the City Ordinance No. 267 is valid and find that the defendant is guilty of having

failed to comply with the law and request that counsel be notified of the finding of this court and that the defendant be brought into court in order that the court can impose a fine in conformance with the ordinance next Friday at the hour of 9:30 a.m.

United States of America,
Territory of Alaska—ss.

I, Iris L. Stafford, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a full, true and correct transcription of the proceedings in the rendering of an opinion in the above-entitled cause, taken by me in stenograph in open court at Anchorage, Alaska, on March 11, 1958, and thereafter transcribed by me.

Iris L. Stafford.

United States of America
Territory of Alaska
Third Division—ss.

I, The Undersigned, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that this is a true and full copy of an original document on file in my office as such clerk.

Witness my hand and the Seal of said Court this 4th day of Dec., 1958.

Wm. A. Hilton,
Clerk of the District Court.

[Seal] By Rosemary Rice,
Deputy.

In the District Court for the District of Alaska

Third Division

Cr. No. 3501

The Town of Seward,
a Municipal Corporation,
Plaintiff,

vs.

Emma Lu Garrett, d/b/a
New Northern Bar,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 29th day of August, 1956, a complaint was filed in the City Court of the Town of Seward, charging the defendant with a violation of Section 6(a) and 12 of Ordinance 267, and that on the 19th day of September, 1956 the defendant was found guilty as charged in the complaint.

The defendant then appealed the decision of the municipal magistrate and the judgment was affirmed and a $50.00 fine imposed on the 17th day of March, 1958. The Court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

That the defendant, Emma Lu Garrett, doing business as New Northern Bar, failed to comply with the provisions of Section 6(a) and 12 of Ordinance 267.

II.

The only question raised by the defendant on appeal was the validity of Ordinance 267.

CONCLUSIONS OF LAW

1. The defendant is guilty as charged beyond a reasonable doubt as set forth in the complaint.

2. The exemptions allowed in Ordinance 267 do not vitiate the ordinance itself and any aggrieved taxpayer would have a right by way of mandamus to enforce the collection of taxes against any category of property which the city council might have unlawfully exempted. The passage of Ordinance 190-A in the referendum held thereon and all the other procedural requirements were complied with and Ordinance 190-A was lawfully enacted. The passage of Ordinance 267 after Ordinance 190-A which ordinance effected certain provisions of 190-A did not require a referendum in that the city council of the Town of Seward had by virtue of Ordinance 190-A the power to impose this type of tax.

Dated this 2nd day of April, 1958.

J. L. McCarrey, Jr.,
Judge of the District Court.

Receipt of a copy of the foregoing findings & concl. and due and timely service thereof is hereby acknowledged this 2 day of April, 1958.

David H. Thorsness,
Attorney for defendant.

United States of America
Territory of Alaska
Third Division—ss.

I, The Undersigned, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that this is a true and full copy of an original document on file in my office as such clerk.

Witness my hand and the Seal of said Court this 4th day of Dec., 1958.

Wm. A. Hilton,
Clerk of the District Court.

[Seal]

By Rosemary Rice,
Deputy.

In the District Court for the District of Alaska

Third Division

Cr. No. 3501

The Town of Seward,
a Municipal Corporation,
Plaintiff,

vs.

Emma Lu Garrett, d/b/a
New Northern Bar,
Defendant.

JUDGMENT

On the 17th day of March, 1958 defendant appeared and through her attorney, David Thorsness of Davis, Hughes & Thorsness, and the plaintiff Town of Seward appeared through S. J. Buckalew, Jr., Esquire.

It is adjudged that the defendant has been convicted of the offense of failure to comply with Section 6(a) and 12 of Ordinance 267 of the Town of Seward.

It is adjudged that the defendant is guilty as charged in the City Court on a complaint dated the 29th day of August, 1956.

It is adjudged that the defendant pay a fine of $50.00.

Dated at Anchorage, Alaska, the 2nd day of April, 1958.

J. L. McCarrey, Jr.,
Judge of the District Court.

This Judgment may be entered without further notice to the defendant.

Receipt of a copy of the foregoing Judgment and due and timely service thereof is hereby acknowledged this 2nd day of April, 1958.

David H. Thorsness,
Attorney for defendant.

Entered Journal No. J58 Page No. 258 Apr. 2 1958.

United States of America
Territory of Alaska
Third Division—ss.

I, The Undersigned, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that this is a true and full copy of an original document on file in my office as such clerk.

Witness my hand and the Seal of said Court this 4th day of Dec., 1958.

Wm. A. Hilton,
Clerk of the District Court.

[Seal]

By Rosemary Rice,
Deputy.

Appendix "F"

Chapter 96, SLA 1951

AN ACT To empower Board of Directors of Independent School Districts or Incorporated School Districts, pursuant to referendums, to levy sales taxes within their respective Independent School Districts or Incorporated School Districts and amending Section 14 of Chapter 77 of the Session Laws of 1935 as amended by Section 2 of Chapter 7 of the Session Laws of the Extraordinary Session of 1946 (Section 37-3-54 ACLA 1949).

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That Section 14 of Chapter 77 of the Session Laws of Alaska, 1935, as amended by Section 2 of Chapter 7 of the Session Laws of the Extraordinary Session of 1946 (Section 37-3-54 ACLA 1949), is hereby amended to read as follows:

A. LIEN AND LIABILITY FOR TAXES: ENFORCEMENT: BOARD TO HAVE TAXING POWERS AND DUTIES OF COUNCIL: REFUNDS. All taxes levied and assessed by the school board under this article shall be a lien upon the property assessed and such lien shall be prior and paramount to all other liens and encumbrances, and may be foreclosed by an appropriate action in any court of competent jurisdiction. The owner of the property assessed shall be personally liable for the amount of taxes assessed against such property; and such taxes,

together with penalties and interest, may be collected after the same has become due, in a personal action brought in the name of the school district against such owner in any court of competent jurisdiction. Provided: That the school boards in independent school districts in the levy and collection of taxes shall have all of the powers and duties given to the common council of municipal corporations and the laws relative to the levy and collection of taxes in municipal corporations are hereby extended to Independent School Districts.

Further provided: That all provisions in Sections 1331 to 1336, inclusive, Compiled Laws of Alaska 1933 (Sections 37-3-61 through 37-3-66 ACLA 1949 herein), requiring refunds of Territorial money to cities and incorporated school districts, and establishing procedures therefor, are hereby made applicable to Independent School Districts.

B. CONSUMER'S SALES TAX. The School Boards in Independent School Districts or Incorporated School Districts shall have the power to levy and collect a consumer's sales tax not exceeding two per centum of the sales price on all retail sales and services made within the Independent School District or the Incorporated School District; provided, that the consent of the qualified voters of the Independent School District or Incorporated School District is first obtained through a referendum vote at a general or special election, upon ballots which clearly present the proposition as to whether such sales tax shall be authorized within the Independent School District or

Incorporated School District. The ballot shall also set forth whether the tax is to be levied for general revenue for the Independent School District or the Incorporated School District or for a special school purpose, and, if for a special school purpose, same shall be specified on the ballot. If fifty-five per cent (55%) or more of the votes cast in said referendum are in the affirmative, the school board may thereafter enact such a tax in the nature of a levy upon buyers but with imposition upon sellers of the obligation of collecting same at the time of sale or at time of collection with respect to credit transactions, and transmit same to the Independent School District or Incorporated School District. The sole purpose of this subsection is to enable Independent School Districts or Incorporated School Districts, with the consent of the residents thereof, to impose sales taxes, and that although such method of taxation be established within an Independent School District or Incorporated School District, the school board may at any time abandon same. It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum. It is further provided that no tax shall be levied or imposed hereunder upon either sales or services made within any incorporated municipality or school district which is a part of any independent school district where such incorporated municipality levies a consumer's sales tax upon the sales price of either or both retail sales and services made within it.

Approved March 24, 1951.